

UNITED STATES OF AMERICA

V.

SALIM AHMED HAMDAN

**DEFENSE NOTICE OF
MOTION**

**(VIOLATION OF
ARTICLE 103 OF
THE THIRD
GENEVA
CONVENTION AND
UNITED STATES
GOVERNMENT
REGULATIONS)**

19 August 2004

The Defense in the case of the *Salim Ahmed Hamdan* provides the following notice of motion:

1. This Notice is filed in accordance with the Presiding Officer's Order made via Email on 31 July 2004.
2. Relief Requested: The Defense seeks dismissal of charges based on denial of speedy trial.
3. Synopsis of Legal Theory: The lengthy pre-trial confinement of Mr. Hamdan violates Article 103 of the 1949 Geneva Convention, as well as United States Government regulations. Article 103 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3394, 75 U.N.T.S. 135, provides that

[j]udicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. *In no circumstances shall this confinement exceed three months.*

(Emphasis added.) Additionally, Article 5 of the Geneva Convention states:

[S]hould any doubt arise as to whether persons . . . belong to any of the categories [entitled to protection as a POW under the Convention], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Likewise, Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-6(a) (1997), at 70, requires that United States military forces abide by the provisions of Article 5 of the Geneva Convention. Finally, Department of the Navy, NWP 1-14M: The Commander's Handbook on the Law of Naval Operations 11.7 (1995), at 77, attached as states that "individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated."

4. Witnesses and Evidence: The Defense intends to enter evidence and call facts witnesses in support of its contention that Mr. Hamdan's pre-commissions confinement was violated Article 103 of the Third Geneva Convention. Additionally in the event that abeyance of hearing this motion below is not granted, the Defense intends t to call expert witnesses concerning the applicability of the Uniform Code of Military Justice to Commission proceedings in support of this motion.

5. Oral Argument: Because the full facts will not be known until such time as a conclusion of evidentiary hearing, the Defense requests oral argument for this motion.

6. Request for an Extension of Time: The Defense moves to incorporate the decisions of the Federal Court into this tribunal process and to hold hearing of this motion in abeyance pending the resolution of the application of the Geneva Conventions and Army Regulations to these proceedings in Federal Court. Detailed Defense Counsel has already challenged in federal court on Mr. Hamdan's behalf as "next friend," the right of the government to hold Mr. Hamdan without charges in pre-commission confinement in violation of Article 103 of the Third Geneva Convention. In order for the Court to resolve the merits of Detailed Defense Counsel's petition, the Federal Court must determine the applicability of Article 103. Detailed Defense Counsel anticipates resolution of this issue prior to its proposed date for commencement of the Commission to hear evidence on the merits of the case. Accordingly, the Defense moves to incorporate the decisions of the Federal Courts into this tribunal process and to hold hearing of this motion in abeyance pending the resolution of the constitutionality of these proceedings in Federal Court.

The proper course for this Commission to proceed is to allow for the Federal Court to decide these matters and for the Commission to follow the Federal Court's guidance. As stated by Attorney General Biddle in the Nazi Saboteur case; in his response to the defense's claim that "the order of the President creating this court is invalid and unconstitutional," Biddle said in part that:

In the first place, I cannot conceive that a military commission composed of high officers of the Army, under a commission signed by the Commander-in-Chief, would listen to argument on the question of its power under that authority to try these defendants.

In the second place, let me say that the question of the law involved is a question, of course, to be determined by the civil courts should it be presented to the civil courts.

Thirdly, this is not a trial of offenses of law of the civil courts but is a trial of the offense of the law of war, which is not cognizable to the civil courts. It is the trial, as alleged in the charges, of certain enemies who crossed our borders, crossed our boundaries, which had then been described by the military and naval authorities, and who crossed in disguise in enemy vessels and landed here. They are exactly and precisely in the same position as armed forces invading this country. I cannot think it conceivable that any commission would listen to an argument that armed forces entering this country should not be met by the resistance of the Army itself under the Commander-in-Chief or that they have any civil rights that you can listen to in this proceeding.

Transcript available at http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm ("Saboteur Tr.") (emphasis added). See also Rehnquist, *All The Laws But One* 137 (1998); *Saboteur Tr.*, at 2765 (adjourning commission for a number of days so that defendants could proceed in Supreme Court); *id.*, at 2935 (remarks of the lead prosecutor, the Judge Advocate General defending commission's jurisdiction: "the defense counsel have attempted to show that Long Island and Florida were not in the theater of operations. I will admit that that contention was made before the decision of the Supreme Court yesterday on the habeas corpus matter. It seems to me that that probably will straighten out the question as to whether this is a theater of operation."); *id.*, at 2963 (remarks of Judge Advocate General, "I do not see how counsel can plead surprise when counsel was arguing that very thing to the Supreme Court)

In the present case the question of the application of Article 103 is now before a civil court and as conceded by the government in its statements and practice with respect to the Nazi saboteurs, the Federal District Court's finding of law will be determinative on this Commission and judicial economy dictates that this motion be held in abeyance pending the civil court's resolution.